

AUG 25 2006

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JORGE GARCIA-ANDRADE,

Defendant - Appellant.

No. 05-50944

D.C. No. CR-05-00333-GAF

MEMORANDUM^{*}

Appeal from the United States District Court
for the Central District of California
Gary A. Feess, District Judge, Presiding

Submitted August 21, 2006^{**}

Before: GOODWIN, REINHARDT and BEA, Circuit Judges.

Jorge Garcia-Andrade appeals from the 36-month sentence imposed following a guilty-plea conviction for being an illegal alien found in the United States after deportation, in violation of 8 U.S.C. § 1326(a), as enhanced by (b)(2).

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm the conviction and sentence and remand to correct the judgment.

Garcia-Andrade contends that his 36-month sentence is unreasonable because the district court refused to further reduce his sentence to account for the “unwarranted” sentencing disparities between Garcia-Andrade and similarly situated defendants who received lesser sentences under fast-track plea agreements. We disagree. Even assuming the district court failed to consider an unwarranted sentencing disparity, the 36-month sentence is reasonable because the district court properly calculated the advisory Guideline range, considered the other 18 U.S.C. § 3553 factors and imposed a sentence below the advisory Guideline range. *See United States v. Marcial-Santiago*, 447 F.3d 715, 719 (9th Cir. 2006) (concluding that unwarranted disparity alone would not render a sentence unreasonable where the sentence was imposed within the Guideline range after considering the Guidelines and other § 3353(a) factors).

Garcia-Andrade also contends that 8 U.S.C. § 1326 is unconstitutional in light of recent Supreme Court case law that undermines continuing validity of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). This contention foreclosed by *United States v. Beng-Salazar*, 452 F.3d 1088, 1091 (9th Cir. 2006).

In accordance with *United States v. Rivera-Sanchez*, 222 F.3d 1057, 1062 (9th Cir. 2000), we remand the case to the district court with instructions that it delete from the judgment the reference to § 1326(b)(2). *See United States v. Herrera-Blanco*, 232 F.3d 715, 719 (9th Cir. 2000) (remanding sua sponte to delete reference to § 1326(b)).

**SENTENCE AFFIRMED; REMANDED TO CORRECT
JUDGMENT.**